

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

IP-Enabled Services

WC Docket No. 04-36

**Comments of the
Information Technology Association of America**

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SUMMARY

Today, providers are using IP to offer a wide range of innovative services and applications, which have provided significant benefits to business and residential users. However, regulatory uncertainty could impede further marketplace development. The Commission should seek to promote further innovation by adopting a clear and consistent regulatory regime, which imposes regulation only where necessary to prevent the abuse of market power or to achieve critical social policy objectives. To do so, the Commission should build on its established regulatory regime, which clearly distinguishes between telecommunications services – which, in appropriate cases, may be subject to regulation – and information services – which are not subject to regulation.

THE COMMISSION SHOULD DISTINGUISH AMONG IP-ENABLED SERVICES

The Commission should distinguish between IP-enabled services that constitute basic telecommunications and IP-enabled services that constitute information services. Consistent with this approach, the Commission should classify as basic telecommunications any IP-enabled service that provides for the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” At the same time, the Commission should classify as information services any IP-enabled service that provides “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” While not all information services involve protocol conversion, the Commission should continue to classify any offering that does include a net protocol conversion as an information service.

Within the category of IP-enabled telecommunications services, the Commission should further distinguish between those IP-enabled telecommunications services that are “POTS-equivalent” and those that are not. Although it was adopted for a somewhat different purpose,

the Commission can use the four-part test adopted in the *Report to Congress on Universal Service* to identify those IP-enabled telecommunications services that are deemed to be POTS-equivalent. The Commission also should distinguish between dominant and non-dominant providers of IP-enabled telecommunications services.

**THE COMMISSION SHOULD NOT SEEK TO REGULATE – AND SHOULD
PREEMPT STATES FROM REGULATING – IP-ENABLED INFORMATION
SERVICES**

Consistent with long-established practice, the Commission should not seek to regulate those IP-enabled services that constitute information services. The Commission should also preempt State regulation of IP-enabled information services.

Carrier access charges. The Commission should not extend the obligation to pay above-cost carrier access charges to information service providers that provide IP-enabled services. Contrary to the suggestion in the *Notice*, the Commission did not “*exempt*” enhanced service providers from paying carrier access charges. Rather, the Commission has repeatedly recognized that, because enhanced/information service providers are end-users – rather than carriers – they *are not subject to* the carrier access charge regime. The Commission should not alter this long-standing position.

Universal service. Section 254(d) of the Communications Act allows the Commission to require providers of interstate telecommunications to contribute to universal service. Information service providers do not “provide” telecommunication services – they *use* telecommunications in order to provide information services. The Commission, therefore, lacks legal authority to require them to make payments to the Universal Service Fund. Even if the Commission had legal authority, there is no policy justification for requiring providers of IP-enabled information services to make Universal Service Fund payments. As users of

telecommunications services, information service providers already contribute to universal service through the payments that they make to providers of telecommunications services.

Social obligations. The Commission should not impose “social” obligations on information service providers that provide IP-enabled services. Title I is a limited grant of “ancillary authority.” While Title I allows the Commission to adopt rules governing common carriers’ participation in the information services market, it does not provide the Commission with general authority to regulate information services. In any case, there is no compelling need for the Commission to apply social regulations to information services. To date, market forces have proven more than adequate to address any legitimate concerns.

Preemption. The Commission should confirm that its preemption of State common carrier regulation of non-carrier-provided information services is fully applicable to State regulation of IP-enabled information services. The Commission should also preempt State regulation of carrier-provided IP-enabled information services, which would “thwart or impede” pro-competitive Commission policy.

REGULATION OF IP-ENABLED TELECOMMUNICATIONS SERVICES SHOULD BE NO BROADER THAN NECESSARY

Although some IP-enabled services may be properly classified as telecommunications, this does not necessarily mean that the Commission should impose the full range of regulatory requirements applicable to telecommunications services provided over the PSTN.

Carrier access charges. The Commission should grant a blanket waiver from the carrier access charge regime to all providers of IP-enabled telecommunications services. This waiver should remain in effect until the Commission has fully reformed the inter-carrier compensation regime. The Commission has repeatedly recognized that the carrier access charge regime is highly inefficient. There is no justification for extending an “imperfect” regulatory regime to a

new category of customers. Indeed, imposition of carrier access charges would deprive consumers of the efficiency benefits of packet-switched technology. Extending the carrier access charge regime to IP-enabled services also would be a significant step toward regulation of the Internet. Finally, expanding the carrier access charge regime to IP-enabled services would have an adverse impact on U.S. international telecommunications policies. If the Commission were to extend the access charge regime to domestic IP-enabled services, it would be significantly more difficult for the United States to oppose proposals to subject international Internet traffic to the accounting rate regime.

Rather than imposing carrier access charges on those IP-enabled services that constitute telecommunications, the Commission should redouble its efforts to reach a decision in the *Inter-carrier Compensation Docket* – which has been pending for nearly three years. Once the Commission has removed implicit subsidies and eliminated inefficient rate structures, the Commission can require providers of IP-enabled telecommunications services to pay for the use of the PSTN in the same manner as other providers of telecommunications services.

Universal Service Fund. The Commission also should forbear from requiring providers of IP-enabled telecommunications and telecommunications services to make payments to the Universal Service Fund until the Commission has fundamentally reformed the funding mechanism.

Dominance regulation. The market for IP-enabled telecommunications services appears to be generally competitive. However, to the extent a carrier has market power in the provision of an IP-enabled telecommunications service, the Commission should impose Title II regulation necessary to ensure that it provides service on a just, reasonable, and non-discriminatory basis.

Facilities-based providers should also remain subject to the obligation to provide any telecommunications services used to offer an information service on an unbundled basis.

Voluntary solutions for social concerns. ITAA recognizes that it may be appropriate to impose certain social obligations on providers of POTS-equivalent IP-enabled services. Rather than imposing prescriptive regulatory requirements, however, the Commission should allow providers of POTS-equivalent IP-enabled services an opportunity to develop voluntary solutions.

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**COMMENTS OF THE
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The Information Technology Association of America (“ITAA”) hereby files these comments in response to the Commission’s Notice of Proposed Rulemaking (“*Notice*”) in the above-captioned proceeding.¹

INTRODUCTION

The Commission initiated this proceeding to consider the regulatory regime applicable to a broad range of services and applications that “make use of” Internet Protocol (“IP”).² Today, providers are using IP to offer a wide range of innovative services and applications, which have provided significant benefits to business and residential users. However, regulatory uncertainty could impede further marketplace development. The Commission, therefore, should seek to promote further innovation by adopting a clear and consistent regulatory approach, which imposes regulation only where necessary to prevent the abuse of market power or to achieve critical social policy objectives. To do so, the Commission should build on its established

¹ *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

² *Id.* ¶ 1.

regulatory regime, which clearly distinguishes between telecommunications services – which, in appropriate cases, may be subject to regulation – and information services – which are not subject to regulation. Specifically:

- The Commission should not seek to regulate, and should preempt States from regulating, IP-enabled information services.
- To the extent that carrier access charges and Universal Service Fund contribution requirements might be applicable to certain IP-enabled telecommunications services, the Commission should forbear from applying these regulatory obligations pending a comprehensive reform of the inter-carrier compensation and Universal Service funding regimes.
- If the Commission determines that entities that provide “POTS-equivalent” IP-enabled telecommunications services must fulfill certain social obligations – such as cooperating with law enforcement, providing access to emergency services, and ensuring access by the disabled – it should give industry a reasonable opportunity to develop voluntary technical solutions.
- The Commission should retain existing rules applicable to dominant carriers that are necessary to prevent abuses of market power, facilitate interconnection, and ensure access to the network elements necessary to provide competitive telecommunications services, regardless of the transmission technology used.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States, ranging from major multinational corporations to small, locally-based enterprises. ITAA’s members include a significant number of information service providers (“ISPs”), which use regulated telecommunications services to provide a wide range of applications to government, business, and residential consumers.

I. THE COMMISSION SHOULD DISTINGUISH AMONG IP-ENABLED SERVICES

In the *Notice*, the Commission asks whether it “should differentiate among various IP-enabled services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate” and, if so, “how we should define these categories.”³ In particular, the Commission seeks comment “on ways to distinguish services that might be viewed as replacements for traditional voice telephony . . . which . . . raise social policy concerns . . . from other services.”⁴ The *Notice* also asks whether the established distinction between telecommunications and information services remains relevant in the IP environment.⁵

ITAA strongly recommends that the Commission differentiate among categories of IP-enabled services. The “IP-enabled services” category is extremely broad. It includes both pure transmission services as well as voice, data, and video applications that involve sophisticated computer processing.⁶ These services and applications may be provided over wireline, wireless, or cable facilities.⁷ They may, but need not, traverse the public Internet.⁸ In order to ensure that regulation will only be imposed where it is absolutely necessary, the Commission must divide these offerings into multiple categories. In doing so, the Commission should adopt clear, bright-line distinctions that will promote business certainty. The Commission should also ensure that the distinctions it adopts are consistent with its established legal authority.

³ *Id.* ¶ 35.

⁴ *Id.* ¶ 36.

⁵ *Id.* ¶¶ 25-26.

⁶ *Id.* ¶ 1 & n.1.

⁷ *See id.* at ¶¶ 67-70.

⁸ *Id.* ¶ 1.

A. The Commission Should Distinguish Between IP-Enabled Telecommunications and IP-Enabled Information Services

The most fundamental distinction that the Commission must make is between those services that – in appropriate cases – may be subject to economic and/or social regulation and those services or applications that should remain free of any form of regulation. The best means to do so, ITAA firmly believes, is to distinguish between IP-enabled services that constitute basic telecommunications and IP-enabled services that constitute information services.

ITAA does not agree with the suggestion that “the disparate regulatory treatment assigned to providers of ‘telecommunications services’ and ‘information services’ might well be inappropriate in the context of IP-enabled services,” and that the Commission should use its authority, under Title I of the Communications Act (“Act”), to craft a new regulatory regime for these offerings.⁹ The distinction between telecommunications and information services has its origin in the *Computer II Order*, adopted in 1980, in which the Commission divided services offered over the public switched telephone network (“PSTN”) into “basic” transmission and “enhanced” services.¹⁰ For the next 25 years, the Commission’s “basic/enhanced dichotomy” provided a clear, widely understood, and broadly accepted means to distinguish between those services that are potentially subject to regulation and those that are not. As the Commission has recognized, Congress effectively codified the basic/enhanced dichotomy in the

⁹ See *id.* ¶¶ 45-46.

¹⁰ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 434 (1980), *on recon.*, 84 F.C.C.2d 50, 53 (1980), *further recon.*, 88 F.C.C.2d 512 (1981), *aff’d sub nom. Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub. Serv. Comm’n v. FCC*, 461 U.S. 938 (1983) (“*Computer II Order*”).

Telecommunications Act – although it chose to “borrow” the terms “telecommunications” and “information service” from the Modified Final Judgment (“MFJ”).¹¹

Although the basic/enhanced dichotomy was developed in the context of a circuit switched network, the “bright line” distinction has proven to be fully applicable to packet-switched services. For example, the Commission has recognized that packet-switched telecommunications services – such as frame relay or ATM – are basic telecommunications services.¹² The Commission’s existing regulatory regime has ensured that dominant carriers that provide basic telecommunications services comply with regulatory requirements that allow end-users to access such telecommunications services on just, reasonable, and non-discriminatory terms. Equally important, the existing regulatory regime has ensured that the Internet and other information services have remained unregulated, thereby providing significant public interest benefits.¹³ There is, quite simply, no reason for the Commission to abandon this well-established, effective regime.¹⁴

¹¹ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 (1996) (subsequent history omitted) (Congress intended “all of the services that the Commission has previously considered to be ‘enhanced’” to be included in the statutory term “information service.”) (“*Non-Accounting Safeguards Order*”).

¹² See, e.g., *Independent Data Communications Manufacturers Ass’n Petition for Declaratory Ruling that AT&T’s InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

¹³ See generally *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 at 23 (July 1999) available at <http://www.fcc.gov/Bureaus/OPP/working-papers/oppwp31.pdf>.

¹⁴ Although the Commission has not conceptualized it as such, the existing regulatory regime can be thought of as a “layered” approach – which distinguishes among the facilities, transport, and applications layers. Pursuant to both the Telecommunications Act and the Commission’s *Computer* rules, carriers may be subject to different types and degrees of regulation at different layers. For example, an incumbent local exchange carrier (“ILEC”) that provides Internet access services over its own facilities may be subject to: (1) interconnection and unbundling regulation

Consistent with this approach, the Commission should classify as basic telecommunications any IP-enabled service that provides for the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”¹⁵ This would include both real-time voice and data transmission services that use IP. A long line of Commission decisions – dating back to 1980 – make clear that the basic telecommunications service category is a narrow one. As the Commission explained in the *Computer II Order*, “[i]n offering a basic transmission service . . . a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”¹⁶

While the Commission should classify IP-enabled services that do no more than provide pure transmission of user-provided information as basic telecommunications, it should classify the vast majority of IP-enabled services and applications as information services.¹⁷ Specifically,

at the facilities layer; (2) price cap rate regulation at the transport layer; and (3) no regulation at the applications layer.

¹⁵ 47 U.S.C. § 153 (43).

¹⁶ *Computer II Order*, 77 F.C.C.2d at 420; *see id.* at 419 (“A basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information.”); *id.* at 419-20 (“[B]asic transmission service [is] limited to the offering of transmission capacity between two or more points suitable for a user’s transmission needs.”); *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order, 84 F.C.C. 2d 50, 53 (1980) (“*Computer II Reconsideration Order*”) (“A basic transmission service is the common carrier offering of transmission capacity for the movement of information between two or more points.”); *International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes*, Report and Order, 104 F.C.C.2d 208, 214 n. 15 (1986) (“The term ‘basic’ service . . . refers to communications transport or message services without computer enhancement.”).

¹⁷ The Commission, of course, should not seek to regulate IP-based applications that are not provided “via telecommunications.”

consistent with the Telecommunications Act, the Commission should classify as an information service any IP-enabled service that provides “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁸ This would include the broad range of currently unregulated services and applications, provided via telecommunications, that make use of IP.

The Commission’s Rules make clear that the information service category is a broad one.¹⁹ In effect, any application that adds computer processing to provide “transmission-plus” constitutes an information service. While not all information services involve protocol conversion,²⁰ the Commission has found that any offering that does include a net protocol conversion is an information service. The Commission has specifically asked whether it should continue to do so.²¹ ITAA believes that it should. Prior to the adoption of the Telecommunications Act, the Commission repeatedly found that protocol conversion constitutes an enhanced service.²² Moreover, protocol conversion falls squarely within the Act’s definition of an

¹⁸ 47 U.S.C. § 153(20). The Commission, of course, should not seek to regulate IP-based applications that are not provided “via telecommunications.”

¹⁹ See 47 C.F.R. § 64.702(a) (“For the purpose of this subpart, the term *enhanced service* shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.”).

²⁰ For example, the Commission has determined that pulver.com’s Free World Dialup service is an information service even though it does not involve protocol conversion. See *Petition for Declaratory Ruling that pulver.com’s Free world Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (“*pulver.com Order*”).

²¹ See Notice ¶ 44.

²² See generally *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956-58 (summarizing Commission decisions).

information service: it provides a user with the “capability for . . . acquiring . . . transforming . . . retrieving, utilizing, or making available information” over the telecommunications network.²³ For example, when a customer using a personal computer uses a service that enables him to send information, in voice format, to a customer using a telephone, the service provider must convert the information from IP to Time Division Multiplex (“TDM”). By doing so, the service provider is plainly “transforming” the information from one format to another, thereby enabling the user to “mak[e] available” the information.²⁴

There is no policy justification for the Commission to depart from its prior conclusion. The classification of protocol conversion as an information service has provided one of the principal bases on which the Commission has found that Internet access service is not subject to common carrier regulation. As the Commission has recognized, the “[e]xpansion of regulation to cover or threaten to cover . . . vendors that have not been regulated can not be sustained in the absence of an overriding statutory purpose.”²⁵ There simply is no such purpose in the Telecommunications Act. To the contrary, Congress has declared that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²⁶

²³ 47 U.S.C. § 153(20).

²⁴ See generally *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, at 6-7 (Sept. 22, 2003). Based on this element, ITAA believes the Commission should classify the service provided by Vonage as an information service.

²⁵ *Computer II Order*, 77 F.C.C.2d at 434.

²⁶ 47 U.S.C. § 230(b)(2).

B. The Commission Should Adopt Two Further Distinctions Within the IP-Enabled Telecommunications Category

In addition to distinguishing *between* IP-enabled services that constitute telecommunications and IP-enabled services that constitute information services, the Commission also should distinguish *among* IP-enabled telecommunications services. As the Commission recognizes, in appropriate cases, it may regulate IP-enabled telecommunications services. However, not all forms of regulation are appropriate for all telecommunications services. Thus, within the category of IP-enabled telecommunications services, the Commission should make two further distinctions. First, the Commission should distinguish between those IP-enabled telecommunications services that are “POTS-equivalent” and those that are not. As discussed further below, only POTS-equivalent IP-enabled telecommunications services should be subject to “social” regulation. Second, the Commission should distinguish between those IP-enabled telecommunications services that are subject to effective competition and those that are not. Only those telecommunications services that are not subject to effective competition should be subject to Title II “common carrier” regulation.

1. POTS equivalency

The Commission should distinguish between those IP-enabled telecommunications services that should be subject to social obligations – such as access to 911 services or disability access – and those that should not. The Commission has suggested a number of bases on which it might do so.²⁷ ITAA believes that the best approach is a “POTS-equivalency” test. Under this approach, the social obligations that are now imposed on providers of traditional telephony services would be imposed only on providers of IP-enabled telecommunications services that

²⁷ See Notice ¶ 37.

offer services that are equivalent of POTS. This will ensure that consumers receive the same level of protection that they do today.

Although it was adopted for a somewhat different purpose, the Commission can use the four-part test adopted in the *Report to Congress on Universal Service* to identify IP-enabled telecommunications services that are deemed to be POTS-equivalent.²⁸ Under this approach, an IP-enabled telecommunications service would be considered POTS-equivalent – and, therefore, potentially subject to any social obligation applicable to conventional telephony – if the service provider:

(1) . . . holds itself out as providing voice telephony or facsimile transmission service; (2) . . . does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) . . . allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan . . .; and (4) . . . transmits customer information without a net change in form or content.²⁹

This approach is preferable to the alternative suggested by the Commission – defining a category of services that are “substitutes” for voice telephony.³⁰ Such an approach could result in existing regulation being extended to services that are not currently subject to such obligations. For example, IP-enabled e-mail or instant messaging (which are information services) could be viewed as a “substitutes” for a voice telephone call. However, the Commission plainly should not subject providers of e-mail services to social obligations, such as the duty to provide access

²⁸ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) (“*Report to Congress on Universal Service*”).

²⁹ *Id.* at 11541. The service should only be classified as “POTS-equivalent” if the service provider meets all four elements of the test.

³⁰ See Notice ¶ 37.

to 911 services. Indeed, imposition of unnecessary social obligations on new IP-enabled services could raise costs, thereby slowing deployment.

2. Dominance test

The Commission also should distinguish between those IP-enabled telecommunications services that should be subject to common carrier regulation – such as entry, exit, and rate regulation – and those IP-enabled telecommunications services that should not be subject to economic regulation. Here, again, the Commission should rely on existing precedent. The Commission has long recognized that it is appropriate to distinguish between “dominant” carriers – which have the ability to profitably raise and sustain prices for telecommunications services above competitive levels either by restricting output or by raising rivals’ costs – and “non-dominant” carriers that lack this ability.³¹ The Commission has specifically recognized that the dominant/non-dominant distinction is applicable to broadband services, including those based on IP.³² Thus, the Commission should distinguish between dominant providers of IP-enabled telecommunications services and non-dominant providers of IP-enabled telecommunications services.³³

³¹ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Report and Order, 85 F.C.C.2d 1, 20-22 (1980) (subsequent history omitted).

³² See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22757 n.52 (2002).

³³ Consistent with established precedent, the Commission should continue to recognize the critical distinction between common carriers, which provide telecommunications service to the public for a fee, and operators of private networks. While the Commission has imposed entry, exit, and rate regulation on common carriers that provide telecommunications service, it has generally not regulated private carriers.

II. THE COMMISSION SHOULD NOT SEEK TO REGULATE – AND SHOULD PREEMPT STATES FROM REGULATING – IP-ENABLED INFORMATION SERVICES

Consistent with long-established practice, the Commission should not seek to regulate those IP-enabled services that constitute information services. The Commission should also preempt State regulation of IP-enabled information services that would thwart or impede the Commission’s deregulatory policies.

A. IP-Enabled Information Services Should Not be Subject to Economic Regulation

The Commission has specifically asked whether it should require providers of IP-enabled services to pay carrier access charges.³⁴ The Commission also asks whether providers of IP-enabled services should be required to make payments to the Universal Service Fund.³⁵ As discussed below, the Commission should not extend the obligation to pay above-cost carrier access charges to information service providers that provide IP-enabled information services. Similarly, the Commission cannot – and should not – require providers of IP-enabled information services to make payments to the Universal Service Fund.

1. The Commission should not extend carrier access charges to information service providers

In the *Notice*, the Commission states that, as a policy matter, “any service provider that sends traffic to the PSTN should be subject to similar compensation obligations” so that “the cost of the PSTN . . . [is] borne equitably among those that use it in similar ways.”³⁶ The Commission further asks whether, to advance this policy, it should require providers of IP-

³⁴ *Notice* ¶ 61.

³⁵ *See id.* ¶¶ 63-64.

³⁶ *Id.* ¶ 61.

enabled services to pay carrier access charges.³⁷ ITAA agrees that the Commission should continue to move toward a regime in which all parties pay cost-based rates for their use of the PSTN. However, imposition of carrier access charges on information service providers that offer IP-enabled services would not be a step in the correct direction.

Contrary to the suggestion in the *Notice*, the Commission did not “*exempt*” enhanced service providers from paying carrier access charges.³⁸ Rather, the Commission has repeatedly recognized that, because enhanced/information service providers are end-users – rather than carriers – they *are not subject to* the carrier access charge regime. The Commission’s carrier access charge rules, first adopted in 1983, make *no mention* of enhanced service providers (“ESPs”) – much less purport to “exempt” ESPs from paying carrier access charges.³⁹ Rather, the Commission’s Rules divide users of the local network into two categories: interexchange carriers (“IXCs”) and end-users.⁴⁰ End-users compensate local exchange carriers for their use of the local telephone network by paying a mix of flat-rate Federal end-user charges and State charges. Interexchange carriers, by contrast, must pay carrier access charges – which were designed to generate large subsidies through the imposition of above-cost, per minute charges.⁴¹

³⁷ See *id.*

³⁸ See *id.* n. 179.

³⁹ See 47 C.F.R. § 69.5(b) (“Carrier’s carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services”); *id.* § 69.2(m) (defining an “end-user” as “any customer of an interstate or foreign telecommunication service that is not a carrier.”).

⁴⁰ See *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241, 243 (1983), *aff’d sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

⁴¹ See generally *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12965-66 (2000) (“*CALLS Order*”) (The access charge regime was adopted “in lieu of” earlier agreements between the pre-Divestiture AT&T and “MCI and the other long-distance competitors” regarding payment for the use of the local network “for originating and terminating interstate traffic.”).

From the beginning, the Commission has repeatedly and consistently concluded that enhanced/information service providers are *users* of telecommunications services, which – like a number of other end-users – connect jurisdictionally-mixed private line networks to the local PSTN.⁴²

Because enhanced/information service providers are end-users, they have always been allowed to pay the ILECs the same combination of Federal and State charges as other end-users with comparable network configurations.⁴³ The Commission’s treatment of enhanced/information services as end-users has been affirmed twice – first by the D.C. Circuit in 1984 and again by the Eighth Circuit in 1997.⁴⁴ The Commission re-iterated its position in its 1998 *Report to Congress on Universal Service*, observing that “information service providers are

⁴² See *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-22 (1983). The Commission’s treatment of ESPs stands in stark contrast to its treatment of resellers – which the agency has consistently classified as carriers. At the time it adopted the *Access Charge Order*, the Commission created an *express* exemption for resale carriers. See *id.* at 769 (reprinting former Section 69.5 of the Commission’s Rules). The Commission subsequently eliminated this exemption based on its conclusion that “resellers of private lines . . . [should] pay the same charges as those assessed on *other interexchange carriers* for their use of these local switched access facilities.” *WATS-Related and Other Amendments of Part 69 of the Commission’s Rules*, Second Report and Order, CC Docket 86-1, ¶¶ 11-14, *reprinted in* 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

⁴³ The Commission has repeatedly rejected proposals to extend the carrier access charge regime to ESPs. See, e.g., *Amendment of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Report and Order on Further Reconsideration, 6 FCC Rcd 4524, 4534-35 (1991) (rejecting claims that imposition of carrier access charges on ESPs would result in significantly lower charges to end-users); *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, 167-69 (1988) (ESPs “will continue to be able to take local business lines, or other state-tariffed access arrangements, instead of federal access, in the same manner as other end-users.”); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, 2632-33 (1988) (terminating docket opened to consider whether to extend carrier access charge regime to ESPs).

⁴⁴ See *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998); *NARUC v. FCC*, 737 F.2d 1095, 1136-37 (D.C. Cir. 1984).

not subject to regulation as common carriers”⁴⁵ and therefore, are not required to pay carrier access charges.⁴⁶

2. The Commission lacks legal authority to require information service providers to make payments to the Universal Service Fund

The Commission also should not seek to require providers of IP-enabled information services to make payments to the Universal Service Fund.⁴⁷ Section 254(d) of the Communications Act, which was adopted as part of the Telecommunications Act of 1996, allows the Commission to require “provider[s] [of] interstate telecommunications . . . [to] contribute” to universal service.⁴⁸ Information service providers do not “provide” telecommunication services – they *use* telecommunications in order to provide information services. For example, when an Internet service provider enables its subscribers to interact with remote computer servers on the Internet, it is neither providing nor reselling an interstate telecommunications service. Rather, it is *using* interstate IP-based packet networks – in conjunction with its own computer processing capabilities – to allow its subscribers to access, manipulate, and/or store information. As the Commission explained in the *Report to Congress on Universal Service*:

Under *Computer II*, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and

⁴⁵ *Report to Congress on Universal Service*, 13 FCC Rcd at 11511.

⁴⁶ *Id.* at 11552.

⁴⁷ *See Notice ¶¶ 63-64.*

⁴⁸ *See* 47 U.S.C. § 254(d).

is categorized as an information service. The information service provider, indeed, is itself a user of telecommunications.⁴⁹

Because information service providers do not provide telecommunications services, the Commission lacks legal authority to require them to make payments to the Universal Service Fund.

Even if the Commission had legal authority, there is no policy justification for requiring providers of IP-enabled information services to make Universal Service Fund payments. As users of telecommunications services, information service providers already contribute to Universal Service through the payments that they make to providers of telecommunications services. There is no reason to subject information service providers – alone among all end-users – to “dual taxation” by also requiring them to make direct Universal Service payments. The best means to address any concern that the Commission may have about the growth of IP-enabled services on the adequacy and competitive neutrality of the Universal Service funding mechanism is to reform the Universal Service funding mechanism – not to extend it to information service providers. As ITAA has previously explained, “[a]doption of a connection-based approach . . . could provide a stable, sufficient, and equitable method for calculating telecommunications carriers’ [Universal Service] payment obligations, while at the same time creating incentives for broadband deployment.”⁵⁰

⁴⁹ *Report to Congress on Universal Service*, 13 FCC Rcd at 11534 n.138; *see also* S. Rpt. 104-23, 104th Cong, 1st Sess., at 28 (1995) (“Information services providers do not ‘provide’ telecommunications services; they are users of telecommunications services.”).

⁵⁰ *Federal-State Joint Board on Universal Service*, ITAA comments, CC Docket No. 96-45, at 3 (Apr. 22, 2002).

B. IP-Enabled Information Services Should Not be Subject to “Social Regulation”

The Commission also seeks comment as to the extent to which it should require providers of IP-enabled services to comply with a range of “social” obligations.⁵¹ The Commission suggests that, in the absence of specific statutory authority, it can use its “ancillary” authority under Title I of the Communications Act to create a new regime.⁵²

Contrary to the Commission’s apparent assumption, Title I is not a general grant of authority to craft whatever regulatory regime the Commission believes is appropriate. Rather, Title I is a limited grant of “ancillary authority.” As the Ninth Circuit has made clear, “Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities . . . In the case of enhanced services, the specific responsibility to which the Commission’s Title I authority is ancillary to [is] its Title II authority . . . over common carrier services.”⁵³ Thus, while Title I allows the Commission to adopt rules governing common carriers’ participation in the information services market, it does not provide the Commission with general authority to regulate information services.

Consistent with this principle, the Commission recognized in *Computer II* that:

Even though an activity falls within our [Title I] jurisdiction, our ability to subject it to regulation is not without constraints. The principal limitation upon, and

⁵¹ See Notice ¶¶ 51-60, 71-72.

⁵² See, e.g., *id.* ¶ 42 (“Where the Act does not prescribe a particular regulatory treatment, the Commission may have authority to impose requirements under Title I of the Act.”); *id.* ¶ 46 (“Ancillary jurisdiction may be employed, in the Commission’s discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.”).

⁵³ *California v. FCC*, 905 F.2d 1217, 1241 n. 35 (9th Cir. 1990), *cert. denied*, 514 U.S. 1050 (1995) (“*California I*”).

guide for, the exercise of these additional powers which Congress has imparted to this agency is that Commission regulation must be directed at protecting or promoting a statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist.⁵⁴

Because, even in 1980, the enhanced services market was fully competitive, the Commission recognized that it would be improper to use its Title I authority to impose regulatory obligations on ESPs because doing so “would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market.”⁵⁵ Rather, the Commission concluded, the proper course was to apply appropriate regulation to the carrier-provided telecommunications services necessary to provide enhanced services – while allowing market forces to regulate ESPs’ conduct. This approach has clearly worked. For example, market forces have resulted in universal interconnectivity and interoperability on the Internet.⁵⁶ The Commission should continue to adhere to this long-established, sensible, and legally sound approach.

The Commission’s decision to impose disability access requirements on providers of voicemail and interactive services (which are information services) does not provide precedent for broader application of the Commission’s Title I authority to regulate information service providers.⁵⁷ In the *Disability Access Order*, the Commission concluded that it could use Title I to impose disability access requirements on voicemail and interactive menu services because these two offerings were “so integral to the use of telecommunications services today” that failure to impose access requirements on these services “would seriously undermine”

⁵⁴ *Computer II Order*, 77 F.C.C.2d at 432-34.

⁵⁵ *Id.*

⁵⁶ See *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper No. 32, at 15-22 (Sept. 2000) available at <http://www.fcc.gov/Bureaus/OPP/working-papers/oppwp32.pdf>.

⁵⁷ See *Notice* ¶ 58.

achievement of Congress’s direction that the Commission ensure that disabled persons have access to telecommunications services.⁵⁸ At the same time, the Commission recognized that it would not be appropriate to use its Title I authority to impose access obligations on other information services because doing so was not “essential” to ensuring fulfilling the Commission’s statutory obligation to make telecommunications services accessible.⁵⁹ Thus, rather than providing precedent for broad application of its Title I authority, the *Disability Access Order* reaffirmed the stringent limits on this authority.

In any case, there is no compelling need for the Commission to apply social regulations to information services. To date, market forces have proven more than adequate to address any legitimate concerns.

C. The Commission Should Preempt State Regulation of IP-Enabled Information Services

The Commission has requested comment regarding the extent to which State regulation of broadband wireline Internet access services can be, has been, or should be preempted.⁶⁰ As demonstrated below, the Commission should: (1) confirm that its preemption of State common carrier regulation of non-carrier-provided information service providers is fully applicable to State regulation of IP-enabled information services; and (2) preempt State regulation of carrier-provided information services that would “thwart or impede” pro-competitive Commission policy.

⁵⁸ *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6457-59 (1999) (“*Disability Access Order*”).

⁵⁹ *Id.* at 6461.

⁶⁰ *Notice* ¶ 41.

1. The Commission’s preemption, in *Computer II*, of State regulation of non-carrier-provided information services remains in effect

In *Computer II*, the Commission concluded that the “efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if [enhanced services] are free from public utility-type regulation.”⁶¹ The Commission therefore preempted States from imposing regulation in this area. This order – which applied to State regulation of enhanced services provided by both carriers and non-carriers – was affirmed by the D.C. Circuit in *Computer and Communications Industry Association v. FCC*.⁶² The Commission reiterated its preemption of State regulation of enhanced services in the *Third Computer Inquiry*.⁶³

A number of parties challenged the Commission’s initial *Computer III Orders* before the Ninth Circuit, in a case known as *California I*. In its decision, the court ruled that the Commission’s preemption of all State regulation of *carrier*-provided intrastate information services exceeded the agency’s authority under Section 2(b)(1) of the Communications Act, which limits the Commission’s authority over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio *of any carrier*.”⁶⁴ By contrast, the court made clear that the restriction on the

⁶¹ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, 541 n.34 (1981).

⁶² 693 F.2d 198 (D.C. Cir. 1982).

⁶³ *See Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C.2d 958, 1126 (1986), *recon.* 2 FCC Rcd 3038 (1987), *further recon.* 3 FCC Rcd 1135 (1988), *second further recon.* 4 FCC Rcd 5927 (1989), *vacated California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *cert. denied*, 514 U.S. 1050 (1995). (“*Computer III Orders*”).

⁶⁴ 47 U.S.C. §152(b)(1) (emphasis added).

Commission's power contained in Section 2(b)(1) does not apply to services "provided by non-common carriers."⁶⁵ "[T]he distinction made by the statute," the court emphasized, "is between . . . carriers and non-carriers."⁶⁶ Although the petitioners challenged only certain aspects of the *Computer III Orders*, the court vacated the orders in their entirety and remanded them to the Commission for further consideration.⁶⁷

Shortly after the *California I* decision, the Commission held, in the *Computer II Waiver Proceeding*, that "[t]he vacation of the *Computer III* orders generally returns the industry and the Commission to a *Computer II* regime" – at least to the extent that the earlier rules are not inconsistent with the court's decision.⁶⁸ The Commission reiterated this conclusion in the *Computer III Remand Order*.⁶⁹ The portion of the *Computer II* decision preempting State regulation of *non-carrier*-provided enhanced services is not inconsistent with the Ninth Circuit's decision in *California I*. Consequently, it remains in effect – and is fully applicable to non-carrier-provided IP-enabled information services.

Events during the last two decades have demonstrated that the Commission's decision in *Computer II* was correct: information services competition has served the public interest. Today,

⁶⁵ *California I*, 905 F.2d at 1240.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1246.

⁶⁸ *Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, Memorandum Opinion and Order, 5 FCC Rcd 4714, 4714 (1990); see *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (A court decision that vacates rules promulgated by an administrative agency has "the effect of reinstating the rules previously in force.").

⁶⁹ See *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, 7597-98 (1991), *vacated in part sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

thousands of companies offer Internet and other information services to customers across the nation. Vigorous competition among information service providers has resulted in the availability of an array of services at reasonable prices. And the lack of disparate State regulations has enabled information service providers to introduce new services quickly and to offer many of these services on a uniform, nationwide basis. Given this experience, the Commission should re-affirm that its *Computer II* preemption of State regulation of non-carrier-provided information services – including IP-enabled information services – remains in effect.

2. The Commission should preempt State regulation of carrier-provided IP-enabled information services, which would “thwart or impede” pro-competitive Commission policy

While the Ninth Circuit held in *California I* that the jurisdictional limitation contained in Section 2(b)(1) of the Communications Act restricts the Commission’s ability to preempt State regulation of *carrier-provided* intrastate information services, the court recognized an important qualification. The court found that the Commission may preempt State regulation of carrier-provided information services that “‘would necessarily thwart or impede’ the FCC’s goals.”⁷⁰ Existing case law makes clear that, under the “thwart or impede” standard, the Commission may preempt any State regulation that, as a matter of economic practicality and operational feasibility, could not co-exist with federal requirements or policies. The Commission, moreover, is not required to wait until a State has adopted a specific regulation before it issues such an order – but may, instead “preemptively preempt” States from adopting certain types of regulations.

Given Section 152(b)(1), the Commission should take care to ensure that it exercises its preemption authority in a manner that is consistent with prior judicial decisions. Consistent with

⁷⁰ *California I*, 905 F.2d at 1243 (quoting *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989)) (emphasis omitted).

existing case law, the Commission must find that: (1) IP-enabled information services are jurisdictionally mixed; (2) it is not possible to have disparate regulation of intrastate and interstate IP-enabled information services; and (3) allowing States to impose regulation on carrier-provided IP-enabled information services would thwart or impede valid federal policies.⁷¹

The Commission can easily make these findings.

The Commission has historically sought to determine the extent of its interstate jurisdiction using an “end-to-end” analysis, in which the Commission determines the starting and ending points of the communications transmission on which the information service “rides.” The Commission has applied this approach to information services.⁷² To be sure, in the case of services provided over the Internet, it is not always possible to determine the points of origin and termination – and, hence, the jurisdictional nature – of any specific communication.⁷³ However, it is indisputable that, while some IP-enabled information services will be purely intrastate, a significant number will be interstate and international. At the same time, however, because of the difficulty of determining the jurisdictional nature of any specific IP-enabled information service, there does not appear to be any practical means to separate – and impose disparate regulation on – specific interstate and intrastate IP-enabled services. Therefore, if States are allowed to impose regulation on intrastate IP-enabled information services, this will almost certainly result in the imposition of regulation on IP-enabled interstate information services. This, of course, would thwart the Commission’s ability to ensure that – as Congress intended –

⁷¹ See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

⁷² See *Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1620 (1992); *Computer II Order*, 77 F.C.C.2d at 430-435.

⁷³ See *Notice* ¶ 40; *pulver.com Order*, 19 FCC Rcd at 3320-21.

“the vibrant and competitive free market that presently exists for the Internet and other interactive computer services” remains “unfettered by Federal or State regulation.”⁷⁴

III. REGULATION OF IP-ENABLED TELECOMMUNICATIONS SERVICES SHOULD BE NO BROADER THAN NECESSARY

While the vast majority of IP-enabled services plainly fall within the category of information services – and, therefore, should not be subject to any form of regulation – the Commission has concluded that some IP-enabled services constitute telecommunications. As noted above, this category is a narrow one: it includes only those IP-based services that provide “a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”⁷⁵ However, even if an IP-enabled service constitutes a telecommunications service, this does not necessarily mean that the Commission should impose the full range of regulatory requirements applicable to telecommunications services provided over the PSTN.

A. The Commission Should Not Require Providers of IP-Enabled Telecommunications Services to Pay Carrier Access Charges or Make Payments to the Universal Service Fund Until the Commission Has Reformed Those Regimes

1. The Commission should waive application of the carrier access charge rules to providers of IP-enabled telecommunications services

The Commission recently concluded that, at least in certain cases, providers of IP-enabled telecommunications services are subject to carrier access charges.⁷⁶ While ITAA does not agree with that decision, we note that the Commission also recognized that it has the

⁷⁴ 47 U.S.C. § 230(b)(2).

⁷⁵ *Computer II Order*, 77 F.C.C.2d at 420.

⁷⁶ See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (¶ 15) (2004).

authority to grant a “waiver” of the carrier access charge rules as applied to “a particular type of service.”⁷⁷ ITAA urges that the Commission use that authority to grant a blanket waiver from the carrier access charge regime to all providers of IP-enabled telecommunications services. This waiver should remain in effect until the Commission has fully reformed the inter-carrier compensation regime. As discussed below, imposition of carrier access charges on IP-enabled services would have a number of adverse consequences.

Stifling of market development. Extending the carrier access charge regime to IP-enabled services would stifle development of these innovative new services. The Commission has repeatedly recognized that the carrier access charge regime is highly inefficient. For example, in the 1997 *Access Charge Reform Order*, the Commission stated that:

[T]he existing access charge system includes non-cost-based rates and inefficient rate structures. . . . [T]here is no reason to *extend* such a system to an additional class of customers. . . . [ESPs] should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because [they] use incumbent LEC networks to receive calls from their customers.⁷⁸

To be sure, the Commission’s *CALLS Order* has eliminated some of the subsidies and inefficient rate structures that have long been a part of the Commission’s carrier access charge regime. However, as the Commission has recognized, the *CALLS Order* created “a transition to a more economically rational approach to access charges” – not the “perfect, ultimate solution.”⁷⁹ Therefore, the conclusion that the Commission reached in the *Access Charge Reform Order* remains correct today: there is no justification to extending an “imperfect”

⁷⁷ *Id.* ¶ 16.

⁷⁸ *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16132-33 (1997) (emphasis added) (“*Access Charge Reform Order*”).

⁷⁹ *CALLS Order*, 15 FCC Rcd at 12973-74.

regulatory regime to a new category of customers. Indeed, imposition of carrier access charges would deprive consumers of the efficiency benefits of packet-switched technology. Unlike a circuit switched telephone call, IP-enabled services do not require the establishment of a temporary dedicated connection between the originating and receiving parties. As a result, the duration of the call has virtually no impact on cost. The benefit of this efficiency will be entirely lost, however, if providers of IP-enabled services must pay above-cost, per-minute charges for access to the ILECs' "last mile" facilities.

Regulation of the Internet. Extending the carrier access charge regime to IP-enabled services would be a significant step toward regulation of the Internet. In the Telecommunications Act, Congress adopted as a national policy "preserv[ing] the vibrant and competitive free market that presently exists for Internet and other interactive computer services, unfettered by Federal or State Regulation."⁸⁰ One of the most basic, and burdensome, forms of Federal common carrier regulation is the obligation to pay subsidy-laden carrier access charges to the ILECs.

If the Commission extends the carrier access charge regime to IP-enabled services, it would mark the first time that the Commission has applied a major common carrier obligation to services provided over the Internet. Inevitably, this will lead to calls for further expansion of traditional common carrier regulation. The end-result is likely to be a significant erosion in the non-regulated status of the Internet, in direct contravention of congressional policy.

International considerations. Finally, expanding the carrier access charge regime to IP-enabled services would have an adverse impact on U.S. international telecommunications policies. In the *Report to Congress on Universal Service*, the Commission recognized the need

⁸⁰ See 47 U.S.C. § 230(b)(2).

to consider the international implications of any proposal to extend carrier access charges to providers of voice-over-Internet services.⁸¹ In subsequent years, the U.S. Government has strongly opposed proposals, still under discussion in the International Telecommunication Union, to extend the international equivalent of carrier access charges – the above-cost and inefficient accounting rate regime – to international Internet traffic. If the Commission were to extend the access charge regime to domestic IP-enabled services, it would be significantly more difficult for the United States to oppose proposals to subject international Internet traffic to the accounting rate regime.

Rather than imposing carrier access charges on those IP-enabled services that constitute telecommunications, the Commission should redouble its efforts to reach a decision in the *Inter-carrier Compensation Docket* – which has been pending for nearly three years.⁸² Once the Commission has removed implicit subsidies and eliminated inefficient rate structures, the Commission can require providers of IP-enabled telecommunications services to pay for the use of the PSTN in the same manner as other providers of telecommunications services.

2. The Commission should forbear from requiring providers of IP-enabled telecommunications services to make payments to the Universal Service Fund

The Commission also should forbear from requiring providers of IP-enabled telecommunications and telecommunications services to make payments to the Universal Service Fund. Here, again, the Commission has recognized that the current funding mechanism is flawed. The Commission has proposed to fundamentally reform the funding mechanism – either by adopting a “connection-based” or a “numbers-based” regime. However, nearly two-and-one-

⁸¹ See *Report to Congress on Universal Service*, 13 FCC Rcd at 11545.

⁸² See *Developing a Unified Inter-carrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

half years after issuing the Further Notice of Proposed Rulemaking the *Universal Service Reform* docket, the Commission has not acted.⁸³ There is little justification for extending a flawed funding mechanism to new providers.

B. Any Dominant Provider of IP-Enabled Telecommunications Services Should Remain Subject to the Title II Requirements Designed to Prevent Abuse of Market Power

The Commission asks whether traditional Title II common carrier regulation – specifically the obligation to provide service on just, reasonable, and non-discriminatory prices, terms, and conditions – is “appropriate in the context of IP-enabled services.”⁸⁴ The market for IP-based telecommunications services appears to be generally competitive. However, to the extent a carrier has market power in the provision of an IP-based telecommunications service, the Commission should impose Title II regulation necessary to ensure that it provides service on a just, reasonable, and non-discriminatory basis.⁸⁵

Facilities-based providers should also remain subject to the obligation to provide any telecommunications services used to offer an information service on an unbundled basis. Although the Commission first articulated this obligation in *Computer II*,⁸⁶ the Commission has repeatedly recognized that the non-discrimination requirement in Section 202 of the Communications Act requires facilities-based carriers to unbundle the telecommunications

⁸³ See *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002).

⁸⁴ Notice ¶¶ 73-74.

⁸⁵ As under the current regime, private carriers should not be subject to common carrier regulation.

⁸⁶ *Computer II Order*, 77 F.C.C.2d at 442-447.

functionality that they use to provide information services.⁸⁷ The Commission cannot forbear from enforcing this requirement: Section 10 of the Communications Act precludes the Commission from forbearing from imposing any statutory provision necessary to ensure that a carrier's practices are not "unreasonably discriminatory."⁸⁸

C. While the Commission May Apply Social Obligations to IP-Enabled Telecommunication Services That are the "Functional Equivalent" of Conventional Telephony, the Commission Should Give VoIP Providers an Opportunity to Develop Voluntary Technical Solutions

The Commission also has sought comment regarding whether various "social" obligations should be imposed on providers of IP-enabled services.⁸⁹ Today, these obligations are typically imposed on carriers that provide conventional voice telephony services over the PSTN. ITAA recognizes that it may be appropriate to impose comparable social obligations on providers of POTS-equivalent IP-enabled services.

Rather than imposing prescriptive regulatory requirements, the Commission should allow industry an opportunity to develop voluntary solutions. As the Commission correctly notes, there is evidence that voluntary agreements can achieve the Commission's social policy

⁸⁷ See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418, 7445 (2001) ("[A]ll carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers."); *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

⁸⁸ 47 U.S.C. § 160(a)(1).

⁸⁹ See, e.g., Notice ¶¶ 51-57 (911/E911); ¶¶ 58-60 (disability access); ¶¶ 71-72 (consumer protection).

objectives.⁹⁰ Further voluntary efforts could lead to other innovative solutions – some of which could meet the Commission’s social objectives in ways that are not even possible with legacy communications systems.⁹¹

IV. DOMINANT CARRIERS SHOULD NOT BE PERMITTED TO EVADE INTERCONNECTION AND NETWORK UNBUNDLING OBLIGATIONS BY PROVIDING IP-ENABLED SERVICES

Finally, the Commission should ensure that dominant facilities-based carriers remain subject to existing obligations designed to facilitate competition. In particular, ILECs should remain subject to the duty to interconnect with competitive local carriers, and to provide access to unbundled network elements. The Commission should reject the approach advocated by SBC, which would eliminate regulation of any “platform” over which a customer can send or receive an IP-enabled service or application.⁹²

⁹⁰ See *id.* ¶ 56 (describing voluntary agreement between the National Emergency Numbering Association (“NENA”) and the Voice on the NET Coalition (“VON Coalition”) to provide VoIP subscribers with access to 911 service).

⁹¹ See, e.g., *id.* ¶ 53 (“IP-enabled services may enhance the capabilities of PSAPs and first responders – and thus promote public safety – by providing information that cannot be conveyed by non-IP enabled systems.”)

⁹² See *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (Feb. 5, 2004).

CONCLUSION

The growth of IP-enabled services is a major technological and marketplace development, which has the potential to provide significant consumer benefits. The Commission should seek to promote further innovation by adopting a clear and consistent regulatory regime applicable to IP-enabled services, which imposes regulation only where necessary to prevent the abuse of market power or to achieve critical social policy objectives. The best means to do so is to build on the Commission's existing regulatory regime – which ensures that dominant telecommunications carriers are subject to appropriate regulation, while allowing market forces to govern the operation of the highly competitive information services market.

Respectfully submitted,

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